84-1990

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

DONALD E. JOHNSON, JR.,

Petitioner,

v.

RANDALL EDWARD REX,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID R. BROUGHAM
of HALL & EVANS
717 Seventeenth Street
Suite 2900
Denver, Colorado 80202
(303) 293-3500

QUESTION PRESENTED

Whether a district attorney can be subjected to a damage claim under 42 U.S.C. §1983 for responding to a police request to advise a criminal suspect of his Miranda rights, and whether the district attorney enjoys absolute immunity under these circumstances, pursuant to the rationale of this Court's decision in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

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OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, which has not yet been published, was announced on March 27, 1985. A verbatim copy is appended hereto as Exhibit A.

On March 12, 1980, the United States District Court for the District of Colorado granted summary judgment in favor of the district attorney by oral order in open court. A transcript of relevant portions of that order is appended hereto as Exhibit B.

JURISDICTION

This Court has jurisdiction to entertain this Petition for Certiorari pursuant to the provisions of 28 U.S.C. §1254(1).

The District Court had jurisdiction of this case pursuant to the provisions of 28 U.S.C. §1331(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution, the Fifth Amendment to the United States Constitution and 42 U.S.C. §1983.

STATEMENT OF THE CASE

A. Procedure

After the Respondent Randall Rex filed his Complaint in this matter, the Petitioner, Donald Johnson, filed a Motion for Summary Judgment for failure of the Complaint to state a claim upon which relief could be granted under the Civil Rights Act, and upon the absolute immunity which the Petitioner contends he enjoys in this matter. The United States District Court granted the Petitioner's Motion for Summary Judgment. Timely appeal was taken to the United States Court of Appeals for the Tenth Circuit which reversed the District Court's Order in a two-to-one decision on March 27, 1985.

This Petition involves only the position of the Petitioner with respect to the majority holding of the Circuit Court finding that a civil rights claim had been stated and that the Petitioner was not protected by absolute prosecutorial immunity.

B. Facts

On September 6, 1977, a seven year old girl was kidnapped and assaulted by a then unknown adult male in Larimer County, Colorado. On September 14, 1977 the Respondent Rex attempted to commit suicide and was taken to a hospital in Loveland, Colorado. The police investigating the incident were called to the hospital because Rex resembled a composite drawing based on the victim's description of the assailant. On September 15, 1977, the Petitioner Johnson was the Chief Deputy of the Larimer County, Colorado District Attorney's office.

Pursuant to a policy of the District Attorney's office in serious felony cases, the District Attorney was frequently called by the police to act in an advisory capacity to ensure that Miranda rights were properly given to suspects in such criminal matters. On September 15, 1977, Johnson was called by a police officer and a request was made that Johnson

attend the initial phase of the interrogation of Rex, who was then a suspect in the above crime. As the undisputed facts before the District Court reflected, Johnson came to the hospital as a "legal advisor" not to "interrogate" but, rather, to make sure that Rex understood his Miranda rights. Rex, who testified at the Summary Judgment hearing before the District Court, disclaimed any memory of the events of September 15, 1977 and the Court was presented with an undisputed version of the facts from an Affidavit and a transcript of the questioning of Rex.

Prior to asking Rex any questions, Johnson received the approval of doctors at the hospital and made sure that Rex was not under any medication.

After being given a classic Miranda warning by Johnson, Rex indicated that he would not answer any questions without a lawyer. At that point, Johnson stopped the questioning and began to leave the room. Rex then asked Johnson and the police officer whether any charges had been filed against him and when he was told "no", Rex stated that "in that case, I would like to talk to you". Following that discussion, Johnson again advised Rex of his Constitutional rights and the fact that he could stop the questioning at any time and ask for an attorney. Johnson then asked Rex questions with respect to the suspect's mental condition and his orientation which would allow Johnson to make a decision as to whether Rex understood his rights and was able to answer questions. Once Johnson felt that Rex had been advised of these rights and had waived them, Johnson left the hospital and the interrogation of Rex proceeded. Johnson was not aware of any incriminating statements Rex may have made because he was not present for any interrogation with respect to the substance of the crime in question.

As the appended decision of the Circuit Court indicates, Rex either confessed or made incriminating statements to the police officer who conducted the interrogation. Charges were filed against Rex and he was subsequently convicted of kidnapping. The Colorado State Court of Appeals reversed the

conviction, finding that under the "totality of the circumstances" the incriminating statements made by Rex to the police officer were involuntary. The civil rights Complaint in this matter followed.

Rex was subsequently convicted a second time, but this conviction was again overturned for evidentiary reasons which have no bearing on this litigation. The Petitioner herein did not prosecute the state criminal case against the Respondent.

The majority in the Circuit Court found that "giving Miranda warnings to a general suspect and participating in his interrogation is police related work and does not fall within the category of a prosecutor's quasi-judicial functions". The dissent in the Circuit Court opinion found that "Johnson was doing exactly what *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.33 (1976), contemplated". It is the rationale of the dissent with respect to the Petitioner Johnson which essentially forms the basis for this Petition.

REASON FOR GRANTING THE WRIT

As reflected by the dissent in the appended Circuit decision, the majority holding of the Circuit Court in this matter would appear to conflict with the decision of this Court in *Imbler* v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) and presents an important question of federal law which has not been specifically settled by this Court and which this Court specifically reserved in its decision in *Imbler*. As this Court noted therein:

> We recognize that the duties of the prosecutor in his role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom . . . Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor

> no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

424 U.S. 431, n.33.

In reserving this question in *Imbler*, the Court, after noting that a prosecutor's activities which are intimately associated with the judicial phase of prosecution are protected by absolute immunity, stated that the case also did not present an "occasion to consider whether like or similar reasons would require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer, rather than that of an advocate". 424 U.S. 431.

The Petitioner in this matter was acting in the role of an advocate and not as a police officer. Subsequent decisions of this Court indicate that the immunity question presented by this matter requires a functional analysis with respect to the particular task being performed by the public official involved. *Butts* v. *Economu*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). With respect to the immunity issue presented by a prosecutor's involvement prior to the actual initiation of criminal charges, the Circuit Courts have utilized the "functional analysis" suggested by this Court and have not limited themselves to the analysis given this case by the underlying Circuit majority. The result has been a number of decisions affording absolute immunity to prosecutors who are acting as an "advocate" as opposed to performing a task which is really no different than that of a police officer.

Perhaps the most recent and analytical discussion of this subject with respect to a prosecutor's involvement in the investigative phase of the criminal process is to be found in *Gray* v. *Bell*, 712 F.2d 490 (D.C. Cir. 1983). In *Gray*, the Court notes that the United States Supreme Court has identified two major factors underlying the granting of prosecutorial

immunity. The first of these is whether the function being performed by the prosecutor is especially vulnerable to retaliatory litigation, and the second is whether there are built-in safeguards which diminish the need for private redress. These safeguards include "judicial scrutiny of prosecutorial conduct", the "exclusionary sanction at trial", and "professional discipline". *Gray*, p. 500.

In the instant matter, it must be noted that all factors considered by the Court in *Gray* exist in this case. The particular task being performed by Mr. Johnson on September 15, 1977 has indeed resulted in retaliatory litigation and yet it has been the subject of those same safeguards noted by the *Gray* Court. A number of other Circuit decisions deal with the issue of whether a prosecutor involved in a particular phase of criminal investigation enjoys absolute immunity, and these Courts have typically found in favor of the prosecutor. See, e.g., *Cook* v. *Houston Post*, 616 F.2d 791 (5th Cir. 1980), *Forsythe* v. *Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979) and *Lerwill* v. *Joslyn*, 712 F.2d 435 (10th Cir. 1983).

The majority decision in this matter is inconsistent with this Court's pronouncements in *Imbler*. More significantly, as a practical matter, this decision will clearly have a chilling and harmful impact on the willingness of prosecutors to respond to requests for assistance from police officers relative to legal advice in such factual contexts as that presented by this case, the preparation of affidavits for arrest and search warrants, and the conducting of lineups to identify criminal suspects. As the dissent in this matter aptly notes, effective and realistic law enforcement prior to the actual filing of criminal charges requires some involvement by the prosecutor in a capacity which is unlike that undertaken by a police officer. The Circuit decision involved here will clearly have a chilling effect on the willingness of prosecutors to render legal advice during investigation of a crime, and can only result in creating situations in which police are left to make their own decisions on legal issues. There are obviously some situations in which a prosecutor can perform the same act as a police

officer and in which he should stand in the same shoes as the policeman with respect to liability. However, it is one thing for a prosecutor to physically assist police in an arrest or search, and a totally different thing for a prosecutor to render legal advice or perform a task ostensibly requiring the participation of a lawyer. The paradox in this case is that the District Attorney in question has been sued for allegedly violating the Respondent's civil rights by attempting to tell the Respondent what his civil rights were. To allow a prosecutor to be subjected to potential monetary civil liability under the facts of this case is inconsistent with the prior decisions of this Court and will be a deterrent to the effective coordination and administration of the criminal justice system in this country under circumstances where legal assistance by the prosecutor is sorely needed.

It has now been almost ten years since this Court clarified the question of prosecutorial immunity with respect to activities of a prosecutor following the filing of criminal charges, and at the risk of being redundant, this case presents an ideal situation for the Court to clarify this question with respect to the prosecutor's involvement in the criminal justice system prior to the initiation of criminal charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Certiorari has been mailed, postage prepaid, this day of June, 1985, addressed to:

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EXHIBIT A

1-28-85

83-2055

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

No. 83-2055

PUBLISH

United States Court of Appeals

FOR THE TENTH CIRCUIT

RANDALL EDWARD REX,

Plaintiff-Appellant,

v.

JOHN P. TEEPLES, DONALD E. JOHNSON, JR., AND EDWARD RUPERT,

Defendants-Appellees.

H. CHRISTOPHER CLARK OF INMAN & FLYNN P.C., DENVER, COLORADO, FOR PLAINTIFF-APPELLANT.

DAVID R. BROUGHAM OF HALL & EVANS (RONALD C. HILL OF ANSTINE & HILL, WITH HIM ON THE BRIEF), DENVER, COLORADO, FOR DEFENDANT-APPELLEE JOHNSON.

WENDELYN K. WALBERG (JOHN E. WALBERG WITH HER ON THE BRIEF), DENVER, COLORADO, FOR DEFENDANT-APPELLEE TEEPLES.

Appeal from the United States District Court for the District of Colorado (D.C. No. 79-W-1346)

Before BARRETT, BREITENSTEIN, and SEYMOUR, *Circuit Judges.*

SEYMOUR, *Circuit Judge.*

Randall Rex brought this civil rights action pursuant to 42 U.S.C. § 1983 (1982) against Loveland police officer John Teeples and Chief Deputy District Attorney Donald Johnson. Rex contends that his constitutional rights were violated when Teeples improperly imprisoned him by placing him on a seventy-two hour mental hold, and when Teeples and Johnson coerced his involuntary confession. The district court granted Johnson's motion for summary judgment, concluding as a matter of law that Johnson was entitled to absolute prosecutorial immunity. The court subsequently granted summary judgment for Teeples, holding that Rex's claims were cognizable only under state tort law and did not rise to constitutional violations. We reverse and remand for further proceedings.

I.

BACKGROUND

The record in this case is scant. Defendants presented little evidence to support their motions for summary judgment, and we must draw our recitation of the facts primarily from the pleadings and related state court opinions. Moreover, we must view the facts and inferences in the light most favorable to Rex as the party opposing the summary judgment motion. *Lindley* v. *Amoco Production Co.*, 639 F.2d 671, 672 (10th Cir. 1981); 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2716 at 643 (2d ed. 1983). In his complaint Rex alleges that he was brought to McKee Medical Center in Loveland, Colorado at about 1:30 p.m. September 14, 1977, after he had attempted to commit suicide by carbon monoxide poisoning. While Rex was hospitalized on September 14, Teeples represented himself to Rex as a minister as well as a police officer and questioned him about a recent kidnapping. Rex alleges that Teeples conspired with Dr. Howard Franklin, who was in charge of the Medical Center emergency room, to place Rex under a seventy-two hour mental hold because Teeples had no probable cause to arrest Rex and wanted to question him further. Under Teep-

les' direction, Rex was transferred at about midnight on September 14 to Poudre Valley Hospital in Fort Collins.

On September 15 in Rex's hospital room, Teeples and Johnson began a second interrogation which they taped. Johnson testified in the summary judgment hearing that his only responsibility had been to make certain that Rex was properly advised of his rights and that Rex had waived them, although Johnson also stated that he had been present for at least forty-five minutes of the four to five hour interrogation and had asked some questions. Rex alleges that Johnson and Teeples took advantage of his confused mental state during this questioning, deceived him into believing he was not a suspect, induced him to talk without the assistance of an attorney, and coerced him into telling them what they wanted to hear. On September 16, Rex was transferred to the Larimar County jail, and on September 19 a criminal information was filed charging Rex with attempted murder, second degree kidnapping, and third degree sexual assault.

The sexual assault charge was dismissed after a preliminary hearing. Rex's first trial on the remaining counts ended in a mistrial. Following a new trial, Rex was convicted. The second degree murder count was dismissed in post-trial proceedings, and Rex's conviction on the count of second degree kidnapping was reversed on appeal. *People* v. *Rex*, 636 P.2d 1282 (Colo. Ct. App. 1981). The Colorado court concluded that Rex's statements during the September 15 interrogation were involuntary as a matter of law because "the police took advantage of [his] confused mental state and deceived him into believing that he was not a suspect in a crime." *Id.* at 1284. Following a third trial at which the involuntary statements were not introduced, Rex was again convicted of second degree kidnapping. That conviction was reversed on appeal for reasons not relevant to the issues before us. *See People* v. *Rex*, No. 82CA1198 (Colo. Ct. App., April 19, 1984), *reported in* 13 *Colo. Law.* 1051 (1984).

II.

SUMMARY JUDGMENT FOR TEEPLES

Rex alleges that Teeples deprived him of his constitutional rights by Teeples' actions involving the imposition of the mental hold and by his participation in obtaining the involuntary statements. The district court held that these claims do not assert constitutional deprivations remediable under section 1983. We disagree.

A. The Mental Hold

Colorado law provides an emergency procedure under which a peace officer may, upon probable cause, place a person in an appropriate facility for a seventy-two hour treatment and evaluation when that person "appears to be mentally ill and, as a result of such mental illness, appears to be an imminent danger to others or to himself . . . " Colo. Rev. Stat. § 27-10-105 (1973)[1] Rex alleges in his complaint that Teeples had Rex placed on mental hold not because he appeared to be an imminent danger to himself or others, but because Teeples suspected Rex of a crime.

The propriety of the mental hold was not addressed in the proceedings below. The record is absolutely devoid of anything on this issue except Rex's allegation that Teeples conspired with the doctor to hold Rex for an improper purpose, an allegation that we must accept as true. Notably absent is any affidavit from either the doctor or Teeples describing why Rex was placed on mental hold. If, as Rex alleges, Teeples deprived Rex of his freedom by placing him under a mental hold without the probable cause required by state law and for an improper purpose, Rex was denied his liberty without due process, an injury to his constitutional rights for which section 1983 provides a remedy. *See, e.g., Lessman* v. *McCormick,* 591 F.2d 605, 609-11 (10th Cir.

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1 Although this statute has since been amended, the quoted language remains unchanged. *See* Colo. Rev. Stat. § 27-10-105 (Supp. 1984).

1979). Accordingly, we reverse and remand for further proceedings on this claim.

B. The Involuntary Statements

We also conclude that Rex has stated a constitutional claim arising from the September 15 interrogation. Extracting an involuntary confession by coercion is a due process violation. *Haynes* v. *Washington*, 373 U.S. 503, 513-15 (1963); and *Spano* v. *New York*, 360 U.S. 315, 320-23 (1959). This is so notwithstanding the coercion is psychological rather than physical. *See Spano*, 360 U.S. at 323; *Duncan* v. *Nelson*, 466 F.2d 939, 944-45 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972). Consequently, extracting an involuntary confession is actionable under section 1983. *Id.*; *Kerr* v. *City of Chicago*, 424 F.2d 1134, 1138 (7th Cir.) *cert. denied*, 400 U.S. 833 (1970); *Lewis* v. *Brautigam*, 227 F.2d 124, 128 (5th Cir. 1955).

In this case Rex alleged that the improper interrogation took place while he was under the influence of carbon monoxide poisoning, and that defendants misled him and coerced his statements from him. The Colorado Court of Appeals reversed his conviction on this ground, concluding that the police had taken advantage of his mental state and had deceived him. We believe there are factual issues precluding summary judgment on this claim, particularly when we view the transcript of the taped interrogation most favorably to Rex. Indeed, at the summary judgment hearing Johnson conceded that nothing in the transcript establishes that Rex waived his right to an attorney and asked defendants to come back and talk to him. *Johnson stated the existence of waiver was a matter of his, Johnson's, credibility because he knew what had happened there that day.* Rec., vol. II, at 35. Moreover, the transcript shows that Rex repeatedly said, "If I do make an attempt to incriminate myself at any time, I wish you'd get me a lawyer." Rec., supp. vol. I, at 22, 27. Under these circumstances, the issues involving the voluntariness of the statements are particularly inappropriate for resolution by summary judgment. Accordingly, we conclude that Rex

has stated a constitutional due process claim arising out of the alleged coerced confession. The summary judgment on this ground is reversed.

III.

SUMMARY JUDGMENT FOR JOHNSON

In view of our conclusion in Part IIB *supra* that Rex has alleged a constitutional claim arising from the September 15 interrogation, we must address the district court's conclusion that Johnson, as a deputy district attorney, was absolutely immune for his part in obtaining the allegedly involuntary confession.

A prosecutor is absolutely immune only for those activities "intimately associated" with "initiating a prosecution [and] presenting the State's case." *Imbler* v. *Pachtman*, 424 U.S. 409, 430-31 (1976). Absolute prosecutorial immunity extends no further than necessary to protect those activities. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 811 (1982). Consequently, a prosecutor acting as an investigator has only qualified immunity. *See id.* at n.16. Although identifying those acts entitled to absolute immunity is not always easy, the determinative factor is "advocacy" because that is the prosecutor's main function and the one most akin to his quasi-judicial role. *See, e.g., Lerwill* v. *Joslyn*, 712 F.2d 435, 437 (10th Cir. 1983); *Gray* v. *Bell*, 712 F.2d 490, 500-02 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1593 (1984).

In *Atkins* v. *Lanning*, 556 F.2d 485, 488 (10th Cir. 1977), this court distinguished between the prosecutor's quasi-judicial role warranting absolute immunity, and his "police-related" work not accorded such immunity. We there cited cases making this distinction: *Hampton* v. *City of Chicago*, 484 F.2d 602, 609 (7th Cir. 1973) (planning a raid to obtain evidence of criminal activity not covered by prosecutorial immunity), *cert. denied*, 415 U.S. 917 (1974); *Apton* v. *Wilson*, 506 F.2d 83, 91 (D.C. Cir. 1974) (prosecutorial immunity not available when a civil rights claim "focuses on a prosecu-

tor's actions in the course of directing police investigative activity"); and *Weathers* v. *Ebert*, 505 F.2d 514, 517 (4th Cir. 1974) ("Making an arrest is a police function, not a judicial one...."), *cert. denied*, 424 U.S. 975 (1976). Other courts have held that the preliminary gathering of evidence which may blossom into a potential prosecution is investigatory activity receiving only a qualified immunity. *McSurely* v. *McClellan*, 697 F.2d 309, 320 (D.C. Cir. 1982). "[A] prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities...." *Marrero* v. *City of Hialeah*, 625 F.2d 499, 505 (5th Cir. 1980).

We conclude that giving Miranda warnings to a general suspect and *participating in his interrogation is "police-related" work* and does not fall within the category of a prosecutor's quasi-judicial functions. Accordingly, Johnson is entitled only to qualified immunity with respect to Rex's claims arising from the alleged coerced confession.

Under *Harlow*, summary judgment in favor of a defendant seeking qualified immunity is appropriate only if the constitutional standards governing the challenged conduct were not clearly established. 457 U.S. at 818-19. In this case the law with respect to involuntary confessions and the ability to knowingly waive constitutional rights was clear at the time the questioning took place. The grant of summary judgment in favor of Johnson is reversed.

This action is reversed and remanded for further proceedings.

No. 83-2055

RANDALL EDWARD REX

v.

JOHN P. TEEPLES,
DONALD E. JOHNSON, JR., and
EDWARD RUPERT

BARRETT, Circuit Judge, dissenting.

I would affirm the district court's grant of the defendants-appellees' motion for summary judgment. Some additional undisputed facts reflected by the record should be observed.

Officer Teeples, a Loveland, Colorado police officer, was called to the hospital following Rex's suicide attempt because Rex resembled a composite drawing of a kidnapping suspect. While in the emergency room, Rex requested a minister. Teeples was also a minister and he identified himself to Rex both as a minister and as a police officer. Teeples questioned Rex briefly about the kidnapping matter. Rex was later moved to another hospital, by direction of his attending physician, and placed on a 72-hour "mental hold." All of this occurred September 14, 1977.

On September 15, 1977, Officer Teeples, out of concern, requested that Chief Deputy District Attorney Johnson come to the hospital to supervise Rex's *Miranda* advisement. Johnson did so and he determined that Rex could be interrogated. Johnson then advised Rex of his *Miranda* rights, and Rex signed a written waiver of those rights. Teeples, and to a far lesser extent, Johnson, then questioned Rex, who eventually confessed to the kidnapping.

My differences with the majority are as follows:

A. The Mental Hold.

The emergency "mental hold" order was, from the record, *the action of the attending physician*, even though the action was apparently requested by Officer Teeples. Under § 27-10-105, C.R.S. 1973, this action was that of a "professional person" referred to in the statute. However, the statute also authorizes the action to be taken by a peace officer. The predicate is that "when any person appears to be mentally ill and, as as a result . . . appears to be an imminent danger to others or to himself . . . " I believe there was every reason why the propriety of the mental hold was not specifically addressed by the trial court. The justification is clear from the record.

Under the circumstances, it was wise and prudent to certify Rex to the short-term involuntary 72-hour commitment because he was *then* dangerous to himself as shown by the suicide attempt, and, given the valid suspicions held by Officer Teeples on the criminal acts of kidnapping and attempted murder, was likely dangerous to others. Dr. Franklin, a "professional" under the Colorado statute, believed that Rex should be placed on the 72-hour "mental hold." This case required a due process balancing. The action here was that recognized as valid under the subject statute by the Colorado Supreme Court in other settings. *See People* v. *Taylor*, 618 P.2d 1127, 1137 (Colo. 1980) (En Banc) ("Passive injury to oneself, because of an inability to take care of one's most basic personal needs, may be as dangerous or damaging to the individual as the active threat posed by suicide."); *People* v. *Lane*, 1581 P.2d 719 (Colo. 1978).

Rex alleged that he was *detained* "without probable cause." "Probable cause" is, of course, terminology justifying the 72-hour "mental hold" under § 27-10-105, C.R.S. 1973. Under Colorado law, when any person *appears* mentally ill and dangerous to *himself* or to others, "a peace officer, a professional person, or a licensed social worker . . . upon

probable cause may take the person into custody, or cause him to be taken into custody . . . in a [designated] facility for a seventy-two-hour treatment and evaluation." § 27-10-105, C.R.S. 1973. It is beyond dispute that Rex's suicide attempt and his own alleged confused mental state indicated that he was, at the very least, a danger to himself. These circumstances alone provided the probable cause necessary to invoke the 72-hour mental hold provision.

B. Summary Judgment for Johnson.

I cannot agree that Deputy District Attorney Johnson is entitled only to a qualified (good faith) immunity when he appeared at the request of Officer Teeples to assure that Rex was properly advised of his rights under *Miranda*. I realize that the courts have "sliced" the prosecutor's functions into what they hope may be specific categories serving to identify the absolute immunity question. It *may be* helpful in certain cases. A prosecutor who accompanies police officers on routine investigative work without any specific objective in mind is involved in routine police "investigative" work. Such is not the case here. Johnson appeared at the request of Officer Teeples to *assure* (because Officer Teeples asked for help) that the mandates of *Miranda* were met *before* general police interrogation. Such is investigation in the broad sense of law enforcement activity. Not all interrogation is investigative in the sense of "police work" in a particular scenario. I am not willing to attempt to slice the prosecutor's activities into neat niches. For example, in *Lerwill* v. *Joslin*, 712 F.2d 435 (10th Cir. 1983), although we said that the prosecutor was acting as an *advocate* before the neutral magistrate, the fact is that he prepared the arrest warrant. Thus, the prosecutor was involved in "investigative" activities necessary to his preparation of the arrest warrant simply because he had to be prepared to establish probable cause. The same is true of a search warrant or a recommendation for bail when a prosecutor appears before the magistrate. He advocates, but he has been and always must be involved in "investigative" work prior thereto.

Johnson was doing exactly what *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.33 (1976), contemplated, i.e., properly *obtaining* evidence:

> We recognize that the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. A prosecuting attorney is required constantly, in the course of his duty as such, to make decisions on a wide variety of sensitive issues. These include questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present. *Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence.* At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. [Emphasis supplied.]

The concurring opinion of Mr. Justice White in *Imbler* (joined by Justices Brennan and Marshall) cites with approval the rule that a prosecutor is absolutely immune from suit even for malicious prosecution. 424 U.S. at 437, 438. In deciding whether or not to prosecute, the prosecutor performs a "quasi-judicial" function. This, I submit, requires that the prosecutor act in "obtaining, reviewing, and evaluating the evidence." 424 U.S. at 431, *supra*. See also Forsyth v. *Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979), *cert. denied*, 453 U.S. 913 (1981). In *Atkins* v. *Lanning*, 556 F.2d 485, 488 (10th Cir. 1977), we recognize that a prosecutor must be accorded leeway in performing the function of assembling the state's case and that some investigative work is a necessary part of the prosecutor's preparation of the case. In my view the record supports the trial court's finding that Deputy Johnson was entitled to absolute immunity.

C. Summary Judgment for Teeples.

Rex's involuntary statement was introduced into evidence at his first trial. It is unclear from the record whether Deputy Johnson acted as prosecutor in that trial, but assuming that he did, his adjudicative function in introducing the confession entitled him to absolute immunity against civil rights claims. *Imbler* v. *Pachtman, supra* at 430-31 (1976). Although Officer Teeples does not enjoy a similar immunity against §1983 claims, there is no evidence supporting Rex's allegation that Teeples "caused" the constitutional deprivation.[1] Teeples took Rex's confession only after being informed by Deputy Johnson that Rex had been properly adivsed of his *Miranda* rights and that he had waived those rights. The decision to introduce Rex's confession was made, not by Teeples, but by the prosecutor. The decision to admit the evidence was made, not by Teeples, but by the judge. In my view, these factors constituted intervening factors sufficient to preclude a finding that Teeples caused the involuntary confession to be used against Rex. *See generally Duncan* v. *Nelson*, 466 F.2d 939, 942 (7th Cir. 1972), *cert. denied*, 409 U.S. 984 (1972); *Jackson* v. *Dillon*, 518 F. Supp. 618, 622 (E.D.N.Y. 1981).

It would be sadly ironic if Officer Teeples could somehow be held liable under §1983 on the basis of his dealings with Rex. It should be recalled that Officer Teeples asked Deputy Johnson to come to the hospital to insure that Rex was properly advised of his *Miranda* rights. Johnson, seeking to assist Officer Teeples, attempted to perform this function and

---

1. Traditional tort analysis dictates that another defendant's actions may constitute an intervening cause of plaintiff's injury and thus break the chain of causation so as to relieve the initial actor of liability if the latter defendant's actions were unforeseeable. Prosser, *Law of Torts*, 281-86 (4th ed. 1971). Courts in civil rights cases have generally followed this approach. *See Ames* v. *United States*, 600 F.2d 183, 185 (8th Cir. 1979); *Dellums* v. *Powell*, 556 F.2d 167, 192 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978); *Rodriguez* v. *Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *Hoffman* v. *Halden*, 268 F.2d 280, 296-97 (9th Cir. 1959); *Soto* v. *City of Sacramento*, 567 F. Supp. 662, 688 (D.C. Cal. 1983).

indeed informed Teeples that the proper procedures had been followed. Such efforts on behalf of the police and prosecutors are commendable. To hold Officer Teeples liable on these facts because the Colorado Court of Appeals subsequently found Rex's confession involuntary would, in my view, be unjust. For the above-stated reasons I would hold that the district court did not err in granting the defendants' motion for summary judgment.

EXHIBIT B

THE COURT: Very well. Do you gentlemen wish to argue the matter? How do you want to present it?

MR. BROUGHAM: Well, I think I do have a couple of things to say, Judge. I basically presented my argument a couple, three weeks ago, and I think you understandably, then, wanted to hear some more about this case.

I think it's fairly obvious that the merits of what brought Mr. Johnson into this case are the fact that he simply apparently made the statement, "You haven't been charged with anything yet."

Well, if that rises to the dignity of a Constitutional civil rights violation—

THE COURT: How can it be a civil rights violation to tell the truth?

MR. BROUGHAM: Yes, sir, okay.

THE COURT: That escapes me. There's no evidence that he'd been charged with anything. Do you violate somebody's civil rights by telling them the truth, full facts?

MR. BROUGHAM: Well, I assume the question is rhetorical, Your Honor.

THE COURT: I think so.

MR. BROUGHAM: The second claim in the Complaint against Mr. Johnson is specifically on Paragraph 20 of the Complaint that Mr. Johnson would not let plaintiff's mother see him, same thing. If it's anybody's right, it's hers. In Colorado we do have a juvenile code provision for somebody under 18, the right of the parent to see him.

THE COURT: It's under 1983.

MR. BROUGHAM: Okay, Judge. The only other thing I think is germane is the fact that the identical issue before you of Mr. Johnson and Mr. Teeples are before the Colorado

Court of Appeals; and I think I'm phrasing it correctly, when we were here the last time, you wanted to hear this additional evidence and basically told me, well, I'll either grant your motion or abstain, and I made some crack about why don't you, and you said I think that's where we are.

We would move that the charges be dismissed — I mean, excuse me — the Complaint as to Mr. Johnson be dismissed.

THE COURT: All right, Mr. Clark, I want you to put your argument into two areas. First, you claim a violation of 1983, and secondly you claim a violation of 1985. I want you to argue them separately.

MR. CLARK: As to the 1983 charge, Your Honor, the plaintiff contends, and I think the transcript shows, that he requested a lawyer and that the defendant, Mr. Johnson, continued to question him. It's certainly right on Page 1 of the transcript.

THE COURT: No, the transcript in my judgment does not show that. The transcript in my judgment shows that he asked for a lawyer and, at that point, the questioning ceased and the testimony demonstrates that thereafter there was a voluntary waiver of a lawyer and the questioning proceeded. I do not agree with your statement of what the transcript shows.

MR. CLARK: I'm not referring to what I call the second request for a lawyer. From the top third of the first page—

THE COURT: Yes, I've read it and I stand by what I've said. I think you misread the transcript.

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1990

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

DONALD E. JOHNSON, JR..

Petitioner

v.

RANDALL EDWARD REX,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BEST AVAILABLE COPY

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OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at 753 F.2d 840.

Although Respondent would agree that the United States District Court granted summary judgment in favor of Petitioner on March 12, 1980, Respondent would submit that Exhibit B does not contain the relevant portions of that order.

JURISDICTION

Respondent agrees with the statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent agrees with the statement of Constitutional and statutory provisions cited by Petitioner.

STATEMENT OF THE CASE

A. Procedure

Respondent agrees with the statement of the procedural history of this case.

B. Facts

Although Johnson testified that his purpose in being present at Rex' interrogation on September 15, 1977, was only as an advisor to Teeples, his actual conduct went far beyond that role. Not only did participate in the interrogation of Rex, but he was the person principally responsible for securing the involuntary waiver of the right to counsel and the statements made by Rex.

The Complaint was filed on September 28, 1979, prior to the Colorado Court of Appeals first decision. That decision found that "the police took advantage of the defendant's confused mental state and deceived him into believing that he was not a suspect in a crime." People v. Rex, Colo. App. , 636 P.2d 1282, 1284 (1981). After the second decision of the Colorado Court of Appeals, the charges against Rex were dismissed.

REASON FOR NOT GRANTING THE WRIT

Virtually all of the Circuit Courts which have considered the issue have applied the advocacy/investigative or administrative distinction first suggested by this Court in Imbler v. Pachtman, 424

U.S. 409, 96 S. Ct. 984, 47 L.Ed.2d 128 (1976). See, e.g., Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983); Lerwill v. Joslyn, 712 F.2d 435 (10th Cir. 1983); and Forsythe v. Kleindienst, 599 F.2d 1203 (3rd Cir. 1979).

Such an analysis must be applied on a case by case basis. This functional analysis test was followed by the Tenth Circuit in the present case. While a delineation of how far a prosecutor may go to secure illegal or unconstitutional evidence may be useful, it appears that the Circuit Courts have had no difficulty dealing with the problem. Although prosecutors may have an interest in seeing their immunity strengthened, it is respectfully suggested that granting the

writ of certiorari requested by the Petitioner would not further the interests of either justice or the criminal justice system.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition for Certiorari has been mailed, postage prepaid, this day of September, 1985, addressed to the following:

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SUPREME COURT OF THE UNITED STATES

DONALD E. JOHNSON, JR. *v.*
RANDALL EDWARD REX

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84–1990. Decided November 4, 1985

The petition for writ of certiorari is denied.

THE CHIEF JUSTICE, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

In this case the United States Court of Appeals for the Tenth Circuit held that a prosecutor is not entitled to absolute immunity from liability in a civil rights suit brought under 42 U. S. C. § 1983 based upon the prosecutor's presence during questioning of the plaintiff. Absolute immunity was denied even though the prosecutor was present not as an investigator but as a counsel to advise on compliance with *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

In *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), this Court established an absolute immunity for prosecutors engaged in activities associated with the criminal process. This Court left open the extent to which investigative activities by prosecutors would also come within the umbrella of absolute immunity. But the principle of absolute immunity established in *Imbler* was based on the need to ensure sound decisionmaking by the prosecutor by protecting from fear of retaliatory suits for vigorous law enforcement. Here the prosecutor was acting as an officer of the court in ensuring compliance with the *Miranda* requirements and I would grant the petition for certiorari in order to define the applicability of absolute immunity in this context; surely the prosecutor's action was well within his function as a prosecutor and officer of the court.

1-PP